IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 488

W. F. SNAKARD, *Petitioner*,

v.

FRANKFORT OIL COMPANY, a division of Joseph E. Seagram & Sons, Inc., *Respondent*.

REPLY

Respondents' Brief in Opposition fails to meet the important questions raised in the Petition. It advances instead the theory that the Tenth Circuit Court of Appeals in reversing the judgment the District Court had awarded petitioner "upheld the findings of the District Court in full." (Br. Op. p. 11) To support this theory respondent puts forward erroneous interpretations of the facts and the law involved. In some instances it omitted discussion of important points raised in the Petition. For example, the status of the caveat *after* July 1, 1955, when the joint venture ended, is not mentioned. This and other errors and misinterpretations require petitioner to reply.

I. THE CAVEAT MUST BE CONSIDERED BOTH BEFORE AND AFTER JULY 1, 1955

The most noticeable omission by respondent is its failure to perceive that the slander of title cause of action is divided into two aspects, (1) before July 1, 1955, and (2) after July 1, 1955. The caveat was filed by respondent on March 8, 1955, and remained of record until the early months of 1956, although respondent's interest in the undrilled leases ceased on July 1, 1955. As initially filed, the caveat wrongfully asserted a $\frac{7}{8}$ interest in the leases of the joint venture when its true interest was only a $\frac{1}{2}$ interest. Respondent disarmingly terms this misrepresentation only a "difference in fractions" (Br. Op. p. 12), and further argues that the joint venture contract could have been filed instead and would have done no greater harm. But the contract itself would have indicated to anyone examining the records that petitioner had a $\frac{1}{2}$ interest in the undrilled leases, that Frankfort could only acquire a *temporary* $\frac{7}{8}$ interest *if* it drilled a lease *and* achieved oil production *and* petitioner had elected not to participate.

Respondent further argued that the caveat could not be malicious since it was filed on "advice of counsel." Even if this were a good defense, how does the fact, omitted in the Brief in Opposition, that the same counsel subsequently advised respondent in June, 1955, *to release the caveat* (T.R. 439) affect respondent's assertion of this alleged defense? The trial court found as a fact that respondent's attorney had so advised it. (Fdg. 24, App. p. 6a).

Whatever basis respondent had for asserting a defense of "advice of counsel", it was destroyed when that same counsel countermanded his advice and ad-

vised Frankfort instead to remove the caveat. Among that counsel's reasons for reversing himself was the weakness of the grounds for his original advice, which respondent has left out of its Brief.

One basis offered in The Brief in Opposition for the original "advice of counsel" is petitioner's purported refusal to execute assignments of the various leases to Frankfort and, as another, the Burkett lawsuit against petitioner is put forward. (Br. Op. pp. 5 and 11)

At page 5 respondent asserted that the petitioner "refused" to execute assignments of the leases to respondent citing to the trial court's Finding No. 23. Finding 23 reads:

> "23. Plaintiff assigned to defendant a one-half interest in each lease on which defendant drilled a well; however, the defendant received no such assignment as to the undeveloped leases."

Respondent's attorney on direct examination asserted that petitioner had refused to make the assignments; however, on cross examination he admitted that on December 28, 1954, he sent a letter to petitioner (P. Ex. 18, T.R. 588), stating that he would prepare the assignments for execution by petitioner; he further admitted that up to March 8, 1955, the date of the caveat, he had only sent two such assignments to petitioner, both of which were promptly executed, and that he had never written any other letters to petitioner requesting assignments. (T.R. 430-431). The trial judge found that petitioner fulfilled all of his contract obligations. (Fdg. 28, App. p. 6a)

At page 11, respondent further offers the fact that "petitioner's rights in the leases were already under attack in the litigation brought by Burkett" as a basis

for the caveat. The following is an excerpt from a letter of January 27, 1955 (Pl. ex. 53, T.R. 647), from Burkett's attorney to respondent's attorney:

> "This is to advise you that the plaintiff Gordon Burkett insofar as any claim that he has to said lease is concerned, will fully honor the contract or contracts above referred to entered into between your company and W. F. Snakard, and that any interest that Gordon Burkett might be entitled to receive in and to said lease will be subject to the terms and conditions of said contract. . . ."

A similar letter was sent on March 2, 1955 (Pl. ex. 54, T.R. 648), reaffirming the January 27 letter.

The second advice given by counsel to respondent disposes of the alleged defense. But the preceding three paragraphs show that the original advice was unjustified. These points were brought out at trial from the counsel in question. (T.R. 430 et seq.) The trial judge must have considered them as throwing considerable doubt upon the "good faith" assertions of respondent.

The omissions by respondent in treating the circumstances involved in the preceding paragraphs cannot be regarded as minor, but respondent's brief failed to consider a much more vital point: the status of the caveat after July 1, 1955. The caveat was a slander of title before July 1, when respondent claimed a greater interest than it had, but after that date, it claimed a $\frac{3}{4}$ interest when it had none at all. *On July 1, 1955, the joint venture expired.* It expired when the leases it was created to develop expired. As of that date, respondent ceased to have any interest at all in any of the leases it had failed to drill. As of that date the "difference in fractions" in the caveat increased

from about 50% to 100%. Frankfort owned nothing, but the caveat told "the world" from July 1, 1955, until February and March, 1956, that Frankfort owned 7/8 of the leases which petitioner tried to save after many fruitless efforts to have Frankfort develop them. Petitioner for months earnestly tried to get Frankfort first to drill the rich Thomas and Christian leases, then to release the caveat so that he could get capital to do it himself. Against the duty raised by the fiducial joint venture, against the advice of its attorney, respondent wilfully refused and effectively prevented petitioner from obtaining the money he needed to succeed on those leases. Such was the trial court's finding in assessing the damages. The leases were lost by the petitioner "as a result of the acts and omissions of the respondent". (Fdg. 30(a)(1), App. p. 12a)*

II. A REAL CONFLICT EXISTS

Respondent's treatment of the cases advanced by petitioner to demonstrate the conflict between the Tenth Circuit and the other circuits is completely negative. Not a single case in agreement with the Tenth Circuit is cited in the Brief in Opposition. In discussing the cases cited by petitioner, respondent misunderstands the ones it attacks individually, *Paramount*, *Helfer* and *Horsfall*, and leaves the other sixteen cases unchallenged.

At page 14 respondent makes the rather amazing statement that none of the cases cited in the Petition as being in conflict with this case, lend support to petitioner's case. Respondent begins with *Paramount Pest Control Services* v. *Brewer*, 177 F. 2d 564. It asserts that the District Court had made detailed findings

* References to appendix are to the appendix of the Petition

of fact and conclusions of law and infers that, therefore, this case is not in conflict. If respondent had troubled itself to read beyond the headnote, it might have discovered that the language quoted from that case in the Petition referred to the court's previous disposition of that case when it had remanded it to the District Court to supply omitted findings. The same case had already been up to the Court of Appeals and remanded for the findings referred to in the opinion cited. The remanding decision may be found at 170 F. 2d 553.

The second case treated by respondent is *Helfer v. Corona Products, Inc.*, 127 F. 2d 612. As stated at page 28 of the Petition, the Court of Appeals in the *Helfer* case did not remand for findings because "it had been a protracted litigation, the appellant was appealing in forma pauperis, and he had urged the court to treat the report of the master and the opinion of the trial court as in compliance with rule 52." At page 615 of the court's opinion, the court stated: "... in ordinary course we should be required to review the decree and remand ...". In a subsequent case, *Omaha Hardwood Lumber Co. v. J. H. Phipps Lumber Co.*, 135 F. 2d 3, 10, the Eighth Circuit reaffirmed its position when it remanded for findings as to fraud even though it was not certain that a finding thereon would dispose of the suit.

In all the other cases which respondent asserts fail to lend support to the question raised by petitioner, each and every court found that essential facts had not been found by the trial court and remanded to have the findings made. The principle prevails whether the trial court makes no findings or omits findings on "factual issues which the Court of Appeals found critical."

The latter quotation is from page 15 of respondent's brief and in connection therewith we think the respondent precisely stated petitioner's contention. The Tenth Circuit found the question of malice "critical".

Finally, respondent asserts at page 15 that petitioner's citation of *United States* v. *Horsfall*, 270 F. 2d 107, as another example of the Tenth Circuit's misinterpretation of Rule 52 was only an attack on the practice of remittitur. This is wholly in error; remittitur is not in question. Respondent has failed to grasp that the *Horsfall* case was a *non-jury* case, thus falling under the fact finding requirements of Rule 52. The Court of Appeals could have exercised its power to remit had it found that a trial court finding was clearly erroneous. As the court itself said (270 F. 2d at 109), "We have no doubt as to our power to review excessive awards of damages . . . . if we are convinced that they are clearly erroneous. *It is impossible for us to make any such determination here as we cannot ascertain from the findings how the trial court gave effect to an important element of damage.*" (Emphasis added.) Then the Court of Appeals ruled the damages excessive and remanded, not for the omitted finding but for plaintiff to remit $17,550 or face reversal and a new trial.

The correct practice under Rule 52 in cases of this sort is exemplified by another *non-jury* case, *Alexander* v. *Nash-Kelvinator Corporation*, 261 F. 2d 187 (CA 2), and *Alexander* v. *Nash-Kelvinator Corporation*, 271 F. 2d 524 (CA 2). This was an automobile negligence case and the trial court failed to make its damages findings "with sufficient particularity." In its first opinion the Second Circuit remanded for specific

findings of fact as to damages by the trial court and stated its reasons for doing so as follows:

> "This court is mindful of the principle so frequently reiterated that the question of the excessiveness of a jury verdict is to be determined by the trial court on a motion for a new trial. In such cases the trial court, in effect, occupies the position of a reviewing judge. He has the power to pass upon, set aside or even refuse by remittitur excessive awards. Where a case is tried by a judge without a jury the defendant is deprived of this right. The first opportunity which an aggrieved defendant has in this respect in a non-jury trial is upon appeal. *For these reasons it becomes most important that the trial court comply meticulously with the requirements of Rule 52(a) with respect to findings so that the appellate court can properly appraise the elements which entered into the award.* Just as the trial judge passes upon possible passion or prejudice and all the other legal grounds for attacking excessive damages on the post-trial motion to set aside a jury verdict so on the appeal the appellate court should have some knowledge of the basis or theory upon which the trial judge acted. Without this information the defendant is unable properly to exercise the appellate rights conferred by statute and the court is equally unable to make appropriate appellate review." (261 F. 2d at 191.) (Emphasis added.)

That case then went back to the trial court and findings were made. It was returned to the Second Circuit Court of Appeals which then exercised its power of remittitur upon deciding some of the findings as to damages to be "clearly erroneous". This is the correct procedure and the one which Rule 52 obliges the Courts of Appeals to follow. The Tenth Circuit did not follow it in the *Horsfall* case any more than it followed the requirements of the Rule in this case.

III. RESPONDENT'S NEW INTERPRETATION OF THE CONTRACT IS WRONG

On page 12 of its brief, respondent gives a completely incorrect interpretation of the joint venture, an interpretation never before attempted. It asserts that respondent had a "present 7/8ths interest" in all of the leases "subject to reduction to a 1/2 interest" by "petitioner's election to participate or by respondent's recoupment of drilling costs" if petitioner chose not to participate. (If by this respondent is now admitting that the caveat was, as petitioner has asserted, and as the trial court decided[1], an election by respondent to drill all of the leases, then petitioner happily concurs in this interpretation because then respondent is admitting that it breached its obligation to drill all of the leases following such an election.) However, the contract *by itself* only gave respondent a one-half interest. In making its assertion, respondent cited its letter (a part of the contract) of October 12, 1954, to petitioner. (App. C 3, p. 37a et seq.) This letter opens, "We are the owners of an undivided one-half interest in the oil and gas leases. . . ." It continues, "Notwithstanding the fact that we only own an undivided half interest . . ." Furthermore, in the paragraph dealing with non-participation by petitioner it is stated "if any well is productive in which you are a 'non-participating party' Frankfort Oil Company shall own all pipe and equipment in or on said well and 7/8ths of all working interest production from such well . . ."

[1] Conclusion of Law No. 4 of the trial judge reads in part

"4. The defendant elected to drill the remaining undeveloped leases and in then failing so to do breached its contractual agreement with plaintiff." (Conc. 4, App. p. 7a)

Respondent's attention is called to the language of the contracts it drafted, as set out above and in more detail in the instruments themselves. Respondent could only acquire a 7/8ths interest in a well if all of the following circumstances occurred:

(1) if it chose to drill a given lease,

(2) if petitioner elected not to participate, and

(3) if the well proved productive.

Unless all these conditions occurred respondent's interest remained at one-half. Furthermore, if petitioner chose to drill and respondent refused to participate, respondent's interest became zero.

What purpose motivates respondent for the first time to claim that the contract itself gave it a "present 7/8 interest" in all the leases? In all previous stages of this litigation it denied this, since to admit it would demand a companion admission of a duty to drill each lease before it expired. The answer to this puzzle lies on page 11 of respondent's Brief where it entangled itself in Oklahoma law on slander of title.

Under Oklahoma law, respondent states on page 11, malice can exist only in asserting a claim in which there is "no reasonable basis for belief. If the claim is made in good faith, there can be no recovery." Apparently forgetting this "reasonable basis for belief" norm for the moment, respondent plunges forward on its "good faith" leg, referring to its "1/2 interest", to "advice of counsel," to its "right of first refusal" on petitioner's "1/2 interest," and to a certain pending lawsuit. Respondent then seems to have tripped on the fact that it had claimed a 7/8th interest by its caveat. What "reasonable basis for belief" is a 1/2 interest for assert-

ing a ⅞ interest? Respondent realized the obvious answer. But to complete this carefully fabricated defense, respondent did not hesitate to repudiate its position in all former stages of the case and to put forward this absurd and strained interpretation of the original contract to give itself a "present ⅞ths interest" in all the leases at the time of the caveat, when only two leases of twelve had been drilled. Both lower courts unequivocally interpreted the contract standing alone to give a ½ interest to each party.

IV. RESPONDENT'S QUESTIONS PRESENTED

Respondent's Question I should be disregarded because it asserts a fictional legal requirement, i.e., that a successful litigant must object to findings or lack of findings by the trial court. This is contrary to Rule 52 for the reasons stated in the Petition at pp. 35-37. Furthermore, having propounded this unfounded requirement, in its Question, respondent leaves it there suspended, with the only further mention of it as a footnote at p. 14, but without any citation of authority. In effect, respondent would delete the last sentence of Rule 52(b).

V. APPLICATION OF OKLAHOMA LAW

In Part II of its Brief, respondent claims that the Court of Appeals "properly dealt" with the Oklahoma law. Petitioner contests this.

A. Extent of Fiducial Duties

It was error to limit respondent's fiducial duties to the explicit terms of the contract in deciding whether petitioner was entitled to receive geological and geophysical information from respondent. Such is not the Oklahoma rule. The Court of Appeals distinguished

Blackstock v. *Caston*, 184 Okla. 489, 87 P. 2d 1087, because the defendant there was enriched by its concealment of data from plaintiff, and respondent here was not shown to have been so enriched. *The Tenth Circuit was in error on this point. It is not necessary that a slanderer of title be enriched by his wrongdoing. It is sufficient that the plaintiff has lost something.* In fact many cases involving this tort arise from instances in which a plaintiff loses a sale of land to a third party because the defendant had maliciously clouded the title.[2] In *Winn* v. *Warner*, (1947, Tex. Div. App.) 199 S.W. 2d 560, a $23,000 award for loss of an oil and gas lease was affirmed. The defendant's slander of plaintiff's title had prevented plaintiff from drilling the lease before it expired. Defendant was not enriched.

The Court of Appeals was in error in not following *Blackstock* and ignoring the irrelevant matter of unjust enrichment. The decision of the *Blackstock* case was based on the general rule regarding joint adventurers that there is a requirement of the "utmost good faith" in the parties' dealings and not on any such narrow and mechanical reasoning that the defendant must be unjustly enriched.

In *Blackstock*, Caston and three others contracted with the Blackstock Oil Company to drill three wells free of charge upon certain land owned by them. In return for drilling, Blackstock was to have an undivided half interest in any oil discovered.

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[2] See *Kingkaid* v. *Plummer* (1925) 111 Okla. 197, 239 P. 628; *Ward* v. *Mid-West & Gulf Co.* (1923) 97 Okla. 252; and *New England Oil & Pipe Line Co.* v. *Rogers* (1931) 154 Okla. 285, 7 P. 2d 638.

Just as in this case, so far as the report of the decision indicates, the contract between Blackstock and Caston made no provision "requiring that [Blackstock] furnish all geological and geophysical data."

Just as in this case, when Blackstock drilled, it struck a prolific oil field.

Then, instead of giving Caston complete geological information, Blackstock falsely reported that "the well was a water well and would produce only a small quantity of oil." As a result Caston and his three associates sold their interest in the lease to Blackstock for $5,000 when it was in fact worth $100,000. (Compare this false representation with that of Frankfort when it reported Erwin #2, a well to the north, as a producer when it was a dry hole.)

Holding that, under Oklahoma law, the parties were engaged in a joint adventure, the Supreme Court of Oklahoma said that there must be "the fullest and fairest explanation and communication" and that "a duty to speak may arise from partial disclosure." Commenting it was unnecessary for Caston and his associates to establish that Blackstock was "guilty of deliberate fraud," the Court went on to say:

> "it was his duty to give them full and complete information regarding the condition of the well and the prospects of completing the same as a producer."

Accordingly, the Supreme Court of Oklahoma upheld the finding of the Trial Court that

> "defendant, did not discharge in full the duty devolving upon it in its fiduciary relation to plaintiffs."

From this statement it is evident that the decision of the Court of Appeals conflicts with the law of Oklahoma as laid down by that State's highest court. Oklahoma does not require that there be an express provision with respect to geological information *in the written contract* to protect a party to a Joint Venture agreement. Mr. Justice Osborn of the Supreme Court of Oklahoma points out in his *Blackstock* opinion, one joint venturer cannot "convey a false impression by disclosure of some facts and the concealment of others" since "concealment is in effect a false representation that what is disclosed is the whole truth."

Moreover, the Court of Appeals is wrong in excusing respondent because petitioner "never believed nor acted" upon its misinterpretations. The concealment hereby respondent of the geological information made it impossible for petitioner to interest Joe Wolf and the Summit Drilling Company.

At trial, Wolf testified that the very refusal of respondent to drill south (when it possessed geological studies of the lease block) caused Wolf to refuse to finance petitioner. Wolf quite naturally concluded that if the land to the south "wasn't good enough" for respondent to drill, it was not good enough for him (T. R. 188). He further testified that he would certainly have drilled if he had seen the geological data withheld by Frankfort, because it showed a "terrific picture."

B. Effect of a General Finding

At page 17 respondent, in discussing *Wilkerson v. Wasson*, 110 Okla. 66, 235 P. 206, states that there was no general finding in that case from which malice could

be implied and that the Oklahoma court "found" that the defendant had not acted in good faith. Respondent mistook the reasoning of the Supreme Court of Oklahoma for what occurred in the trial court. The trial court did make a general finding for plaintiff and in that connection the Supreme Court said, "*when plaintiff proved that defendants placed that notice on record, and the court found for the plaintiff, it was bound to have found that there was malice in putting it there.*" No other conclusion can be drawn from this language than that the trial court did not make a specific finding of malice but made a general finding for plaintiff from which the Oklahoma Supreme Court was able to infer, by implication from the general finding, that the trial court had found malice.

Petitioner has urged on this Court and on the Court of Appeals the significance of the general finding in his favor. As *Wilkerson* v. *Wasson* holds, a general finding for plaintiff in a slander of title action is "bound" to include an implied finding of malice. That is the law of that case. Under that rule what other effect can be given the language of the trial judge here in his Conclusions of Law? Contrary to respondent's parenthetical suggestions at pages 9 and 18, it is well established that labeling a finding as a conclusion is "immaterial". *Central R. Signal Co.* v. *Longden*, 6 A 7 191 F. 2d 310. Conclusion No. 5 begins:

> "5. If, in fact, the defendant did not intend to elect to drill all these undeveloped leases at the time of the caveat filing, such filing was a deliberate, unjustified assertion of interest in these leases which prevented plaintiff from successfully taking action to develop some or all of these leases prior to their expiration, a right plaintiff held under the terms of the contract." App. p. 7a

Yet the Court of Appeals ignored the obvious import of these words that petitioner's title was slandered. Compare this with the holding of the same Circuit in the earlier case of *Burkhard* v. *Burkhard*, 175 F. 2d 593, 596:

> "The court did not make a specific finding on" whether defendant's relations with deceased were illicit, "but since it found in favor of" defendant, "it is implicit in its findings that the issue was resolved against" plaintiff.

In petitioner's case not only was there a general finding of slander of title in petitioner's favor, but the plain words of the trial judge indicated he found malice.

VI. ADDITIONAL ERRORS

Other errors in the Brief in Opposition are so numerous that they will be dealt with in the order they appeared and as briefly as possible.

1. At page 6, respondent completely misrepresents the trial court's finding when it states "respondent also had geological information which indicated the desirability of drilling to the northeast." It cites Finding 22. Finding 22 reads:

> "22. Between March 1 and June 28, 1955, the defendant drilled five wells to the north of the Erwin No. 1 and the Meadors Estate No. 1, none of which were productive in the second Wilcox. These wells were drilled at a time when the seismic and other geological data indicated that the second Wilcox high lay to the south of the Erwin No. 1 and the Meadors Estate No. 1, and that the structure to the north was a separate structure with shallower sands." (App. p. 5a)

Not only was the above finding misrepresented, but it was cited out of context. The finding preceding it shows clearly what the trial judge meant in his findings. Finding 21 reads:

> "21. The Erwin No. 2 was dry in the second Wilcox but was plugged back to the Oswego and reported as a second Wilcox producer. Moreover, the Erwin No. 2 was credited with full production from the second Wilcox when in fact oil was actually run from the Erwin No. 1. On June 7, 1955, Frankfort started the Amerada-Stanolind in the SE 4 of NW 4, a diagonal offset to the northeast of the Erwin No. 2, and an offset to the west of the Clark No. 1." (App. p. 5a)

2. In the final full paragraph on page 6, respondent asserts that one of the wells drilled after Erwin No. 1 was a producer, once again citing the trial court's finding. Respondent apparently refers to Erwin No. 2 which was found by the trial court to have been a dry hole, although fraudulently reported as a producer by respondent. (Finding 21, App. 5a) This fraud was perpetrated to justify the subsequent wells drilled further north and east into barren ground.

3. At page 7, respondent cites Finding 26 for its allegation that petitioner began drilling on July 1, 1955 on the Thomas and Christian leases "without notice to respondent in violation of the terms of the contracts." This is a misrepresentation of that finding which says nothing about contracts or violations thereof, or for that matter about the Christian lease. It reads in toto:

> "26. On July 1, 1955, the plaintiff, without notice to the defendant, commenced drilling operations upon the Thomas tract (NW 4 of Section 2)." (App. p. 6a)

Finding 28 contradicts respondent that petitioner breached the contract in any manner.

> "28. *Plaintiff substantially performed all obligations* resting upon him under the contract with defendant." (Emphasis added.) (App. p. 6a)

Furthermore, respondent was well aware that petitioner had to move in on July 1, 1955 if he wanted to save the leases which would expire if work was not begun that day. He had pleaded with Frankfort to drill. After work was begun on July 1 respondent never made any move to participate because it knew it had no rights.

4. In footnote 2 on page 7, it is asserted that Inland offered $100,000 for petitioner's interest in the entire lease block. As pointed out in the Petition, the $100,000 was to be provided by petitioner's joint venturer, Frankfort, because Inland was $200,000 down the road to bankruptcy at that time. (See Petition, page 7.

5. At page 13, respondent asserts that the contracts themselves "were not filed because of their bulk", that the caveat "merely gave notice of the underlying contracts". As demonstrated above, the caveat did not merely give notice of the underlying contracts. It is a fair inference that it was filed not because the contracts were bulky, but rather to slander petitioner's title in his half interest to the lease block. No person carefully examining the facts of this case and the instruments involved could in good conscience state, as respondent does, that the effect upon petitioner "would have been the same" if the contracts themselves had been filed instead of the caveat, as respondent asserts.

6. Another Oklahoma case cited by respondent is *Wood v. Mid-West Gulf Co.*, 97 Okla. 252, 223 P.

170. This case was cited at page 11 and at page 16. It is cited at page 11 for the proposition that if the defendant acts in good faith in making a false assertion of title, there is no slander of title involved since malice is absent. Petitioner has no quarrel with that generality. At page 16 the case is again cited, but there the findings in *Ward* are paralleled with the findings of the District Court in this case with the statement "those findings clearly establish the absence of malice under Oklahoma law." Respondent infers that the findings in this case and in the *Ward* case are similar. The finding of the trial court in the *Ward* case was:

> "The court finds . . . that there was no bad faith on the part of either of the defendants."

No such finding was made in the present case by the District Court. On the contrary, a reasonable reading of the findings of fact and conclusions of law involved indicate that the court's general finding in favor of petitioner was predicated on the fact that malice on the part of the respondent existed.

7. Respondent's contention, at p. 17 of its Brief, that petitioner's suit was based only on a breach of contract theory is without support. The Court of Appeals opinion (279 F. 2d 136, at 138) states quite plainly:

> "The complaint in the court below contained two counts, the first alleging breach of contract *and tort* . . . ." (Emphasis added)

The Court of Appeals then went on to discuss the various bases of this case: breach of contract, breach of fiducial duty, and slander of title. It failed to discuss the tort of malicious wrong which had also been

pleaded and proved by petitioner. See p. 42, et seq. of the Petition.

VII. SUMMARY

Respondent's Brief in Opposition did not directly meet the important questions raised by petitioner. In fact it avoided them. Respondent argued that no important questions involving Rule 52 of the Federal Rules of Civil Procedure are present in this case, that the Tenth Circuit here actually affirmed the District Court's findings. It further argued that the Tenth Circuit faithfully applied the appropriate Oklahoma Law. Neither contention is correct. The preceding sections of this Reply demonstrated how insubstantial are the foundations for these contentions.

The essence of Petitioner's questions relating to Rule 52 is that the District Court findings *and* conclusions, made after full opportunity to hear all evidence, and, most important, to see and judge all the witnesses, sustained Petitioner's case not only on a breach of contract theory, but also and equally on the theories of breach of fiducial duty and slander of title. The findings and conclusions taken as a whole, as they must be, allow no other conclusion. This being so, petitioner is entitled to have the judgment of the trial court stand unless the findings are "clearly erroneous". The Tenth Circuit did not indicate that the findings were "clearly erroneous". Ignoring the general finding for petitioner, it stated that a critical finding was absent, that of malice. Having reached that conclusion, it is petitioner's view that the Court of Appeals was bound by Rule 52 and the numerous decisions thereunder to remand to have the trial court supply that finding.

This rule was applied in this way in the last term of this Court in *Stratton v. United States*, 363 U.S.

278, a tax case hinging on whether a $20,000 payment to Stanton was a "gift". The District Court made the "simple and unelaborated finding" that it was a "gift". This Court remanded to the trial court for more detailed finding on this vital and ultimate fact because the "reviewing court" had "not the assistance of an indication" of the basis for the trial court decision.

In so remanding, this Court was reiterating the responsibility that is solely that of the trial court under Rule 52, that of finding the facts. In another tax decision handed down the same day as Stanton this Court declared the "principle of restriction of the appellate court to a jury verdict." In *United States* v. *Kaiser*, 363 U.S. 299, Mr. Justice Brennan said:

> "We need not stop to speculate as to what conclusion we would have drawn had we sat in the jury box rather than those who did. The question is one of the allocation of power to decide the questions . . . ."

In neither case is Rule 52 allocating the "power to decide" facts to the trial court.

Returning to the *Stanton* case, we find the reason for this "allocation" and the motive underlying the remand of that case, again in Justice Brennan's words:

> "Decision of the issue presented in these cases must be based ultimately on the application of the fact finding tribunal's experience with the mainsprings of human conduct to the totality of the facts in each case . . . that the primary weight in this area must be given to the conclusions of the trier of fact."

For the reasons stated here and in the petition, this writ of certiorari should be summarily granted, and this Court should direct the Court of Appeals to reinstate the judgment of the District Court or, in the alternative this Court should remand this case to permit the District Court to make specific findings on such matters as the Court of Appeals found lacking.

Petitioner further respectfully requests this Court to grant the Writ of Certiorari so that the findings and conclusions of triers of fact in the Tenth Circuit may stand under Rule 52 on an equal basis with those of the other Circuits.

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